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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 423

L. J. H. HERWIG, PETITIONER

v.

STUART L. CRENSHAW, COLLECTOR OF INTERNAL REVENUE, AND AS AN INDIVIDUAL,

and

OTTIS E. SNOWA, DEPUTY COLLECTOR OF INTERNAL REVENUE, AND AS AN INDIVIDUAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The memorandum opinion of the District Court (R. I, 198) is not reported. The *per curiam* opinion of the Court of Appeals for the Fourth Circuit affirming the District Court is reported in 188 F. 2d 572.

JURISDICTION

The judgment of the Court of Appeals was filed April 26, 1951 (R. III, 4). Petitioner's motion for rehearing was denied on July 11, 1951 (R. III, 26). By order of Chief Justice Vinson, dated October 8, 1951, the time within which to file a petition for a writ of certiorari was extended to and including November 10, 1951. The petition for a writ of certiorari was filed on November 10, 1951. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether a taxpayer who has included certain income in his return, and who now claims that such income is exempt from taxation but has failed to correct his return or file a claim for a refund, may (1) enjoin collection of the tax after its collection, (2) recover the tax collected, or (3) obtain damages from the officials making the collection.

STATUTE INVOLVED

The applicable provisions of the statute involved are set forth in the Appendix, *infra,* pp. 7-9.

STATEMENT

The taxpayer was retired from the army for disability in 1919 and thereupon became entitled to disability pay. In his income tax return for 1946, the taxpayer included this disability pay as income but made no payment of the tax. The tax was duly assessed by the Commissioner of Internal

Revenue, and, after appropriate notice, was collected by the deputy collector of Internal Revenue by a levy upon the taxpayer's bank account. (R. I, 37, 40.)

The taxpayer instituted proceedings against the collector and the deputy collector, in which he originally sought to enjoin the collection (R. I, 1). In a supplemental complaint, the taxpayer sought recovery for trespass, malicious abuse of process, libel and fraud (R. I, 14).[1]

The district court held that it was prohibited by statute from issuing the injunction, and also that the cause was moot because the taxes had been collected prior to the commencement of the suit. The district court also held that the collectors could not be held liable for damages, since they had acted within their authority and on express authorization of law (R. I, 176).

Thereafter, the taxpayer filed a motion for leave to amend his complaint to include a count for recovery and refund of the tax which had been collected (R. I, 192). This motion was denied on the ground that the taxpayer had not taken the necessary steps preliminary to suit for a refund and because it appeared that the collectors were ready and willing to make the refund whenever

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[1] By further amendment to his complaint, the taxpayer also sought to enjoin collection of a tax on his 1948 income, but this issue was disposed of by the district court on the ground that the cause, if it existed, had abated. The taxpayer apparently does not raise this issue here.

demand was made therefor (R. I, 201). The district court also filed a memorandum in which it stated that the real purpose of the litigation was to obtain an adjudication on the validity of the 1919 army retirement proceedings. The court found that it could not pass upon the case on that basis (R. I, 201).

On appeal, the Court of Appeals for the Fourth Circuit affirmed the holdings below (R. III, 4).

ARGUMENT

1. The district court had no alternative but to dismiss the action for an injunction, since Section 3653 of the Internal Revenue Code (Appendix, *infra,* p. 8) specifically denies the taxpayer that remedy. *Harvey* v. *Early,* 160 F. 2d 836 (C. A. 4). Moreover, as the district court pointed out, the tax had already been collected, and it was therefore too late to test the question through a proceeding for an injunction.

2. A taxpayer is permitted to bring suit for a refund only if he has first filed a claim for a refund with the Commissioner. Sections 322 and 3772 of the Internal Revenue Code, Appendix, *infra,* pp. 7, 9. In fact, the court below indicated that it was clear that if a claim for refund had been made, it would in all probability have been allowed (R. I, 201).

3. The collector and deputy collector were not answerable in damages for making the collection.

The assessment was duly certified by the Commissioner of Internal Revenue before the levy was made (R. I, 40). It is not the duty of the collectors to go behind the assessment once a tax is certified to them for collection. The statute requires them to give notice of the taxes due and to demand payment within ten days after receiving the assessment list (Sec. 3655 of the Internal Revenue Code, Appendix, *infra*, p. 8); it requires them further to proceed to collect the tax within ten days after notice and demand. Section 3690 of the Internal Revenue Code, Appendix, *infra*, p. 8; *Erskine* v. *Hohnbach*, 14 Wall. 613. There is nothing in the record to indicate that the collectors acted in any way beyond the scope of their statutory duties.

4. The district court was quite correct in finding that it had no power or occasion to pass upon the validity of the taxpayer's retirement. As pointed out above, the issues raised in the proceeding were determined by the applicable sections of the Internal Revenue Code, regardless of the validity of the taxpayer's retirement. That retirement was itself not subject to direct review. *Reaves* v. *Ainsworth*, 219 U. S. 296, 306; *French* v. *Weeks*, 259 U. S. 326, 335; and *Creary* v. *Weeks*, 259 U. S. 336, 344.[2]

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[2] A prior attempt by this same taxpayer to review the retirement proceeding through an injunctive proceeding against the Commissioner of Internal Revenue, the Secretary of the Army, and others was dismissed by the United States

5. The taxpayer raises many other points in his petition, but it is believed that all of them are without merit and do not require specific answer.

CONCLUSION

The decision below is correct, and no reason appears which would warrant further review in this Court. We respectfully submit that the petition for a writ of certiorari should therefore be denied.

PHILIP B. PERLMAN,
Solicitor General.

ELLIS N. SLACK,
Acting Assistant Attorney General.

JOHN F. DAVIS,
CAROLYN R. JUST,
Special Assistants to the Attorney General.

DECEMBER 1951.

District Court for the District of Columbia in 1949, and the dismissal was upheld by the Court of Appeals for the District of Columbia, and certiorari denied by this Court. *Herwig* v. *Schoeneman, et al.*, 340 U. S. 935, rehearing denied, 341 U. S. 906.

APPENDIX

Internal Revenue Code:

SEC. 322. REFUNDS AND CREDITS.

(a) [as amended by Sec. 172(e) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Authorization.*—

(1) *Overpayment.*—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

* * * * *

(b) *Limitation on Allowance.*—

(1) *Period of limitation.*—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

* * * * *

(26 U.S.C. 1946 ed., Sec. 322.)

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3653.)

SEC. 3655. NOTICE AND DEMAND FOR TAX.

(a) *Delivery.*—Where it is not otherwise provided, the collector shall in person or by deputy, within ten days after receiving any list of taxes from the Commissioner, give notice to each person liable to pay any taxes stated therein, to be left at his dwelling or usual place of business, or to be sent by mail, stating the amount of such taxes and demanding payment thereof.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3655.)

SEC. 3690. AUTHORITY TO DISTRAIN.

If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with such interest and other additional amounts as are required by law, by distraint and sale, in the manner provided in this subchapter, of the goods, chattels, or effects, including stocks, securities, bank ac-

counts, and evidences of debt, of the person delinquent as aforesaid.

(26 U.S.C. 1946 ed., Sec. 3690.)

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) *Time.*—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3772.)

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